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No. 15-6418

In the Supreme Court of the United States

GREGORY WELCH, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether *Johnson* v. *United States*, 135 S. Ct. 2551 (2015)—which held that the residual clause in the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(ii), is unconstitutionally vague—announced a new "substantive" rule of constitutional law that is retroactively applicable in an initial motion to vacate a federal prisoner's ACCA-enhanced sentence under 28 U.S.C. 2255(a).

2. Whether petitioner's conviction for robbery, in violation of Fla. Stat. Ann. § 812.13(1) (West 2006), qualifies as a violent felony that supports a sentence enhancement under the ACCA.

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OPINIONS BELOW

The order of the court of appeals denying petitioner's application for a certificate of appealability (COA) (J.A. 14a) is unreported. The order of the district court denying petitioner's motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255 (J.A. 25a-27a) is also unreported. A prior opinion in petitioner's case (J.A. 101a-119a) is reported at 683 F.3d 1304.

JURISDICTION

The judgment of the court of appeals was entered on June 9, 2015. The petition for a writ of certiorari was filed on September 2, 2015, and granted on January 8, 2016. The jurisdiction of this Court rests on 28 U.S.C. 1254(1). See *Hohn* v. *United States*, 524 U.S. 236 (1998).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reprinted in an appendix. App., *infra*, 1a-5a.

STATEMENT

In 2010, following a conditional guilty plea in the United States District Court for the Southern District of Florida, petitioner was convicted on one count of unlawful possession of a firearm by a convicted felon, in violation of 18 U.S.C. 922(g)(1). J.A. 130a. He was sentenced to 180 months of imprisonment, to be followed by three years of supervised release. J.A. 132a-133a. The court of appeals affirmed, 683 F.3d 1304, and this Court denied a petition for a writ of certiorari, 133 S. Ct. 913.

In 2013, petitioner filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255. J.A. 79a-100a. The district court denied the motion and declined to issue a certificate of appealability (COA). J.A. 25a-27a. The court of appeals declined to issue a COA and dismissed petitioner's appeal. J.A. 14a.

1. On March 17, 2009, in an investigation of an attempted convenience-store robbery in which two employees were shot, Deputy Sheriff Trevor Goodwin and two other officers knocked on the door to an apartment that the shooter was known to frequent. 09-cr-60212 Docket entry No. (Dkt. No.) 31, at 2 (May 28, 2010). The person who answered said he did not live there or know who did, but that someone else was present although he did not say who. *Ibid.* The officers entered the apartment and conducted a protective sweep to see if anyone inside posed a threat to them. *Id.* at 2-3. During the sweep, deputies discovered an individual, later identified as petitioner, talking on a cell phone and minding a baby. *Id.* at 3.

Deputy Goodwin explained to petitioner that the deputies were looking for the shooter and the gun that

he used during the robbery, and he asked petitioner for permission to search the apartment. Dkt. No. 31, at 3. Petitioner refused to consent to a search. *Ibid.* When the deputies told petitioner they would now have to get a search warrant, which "could take a while," petitioner consented to the search and signed a written consent form. *Ibid.* During a search of the apartment, officers found a Lorcin, Model L380, .380-caliber semi-automatic pistol, loaded with six rounds of ammunition, in "an attic space." *Id.* at 4; Presentence Investigation Report (PSR) ¶ 11. Petitioner gave a recorded statement admitting that he owned the firearm and ammunition. Dkt. 31, at 4. Further investigation revealed that petitioner was a convicted felon. PSR ¶ 11.

2. A federal grand jury in the Southern District of Florida returned an indictment charging petitioner with one count of unlawful possession of a firearm and ammunition by a convicted felon, in violation of 18 U.S.C. 922(g)(1). J.A. 194a-196a. Petitioner moved to suppress both the physical evidence (the gun and ammunition) and his recorded statement, on the grounds that they were fruits of an illegal search of the apartment. Dkt. No. 16 (Mar. 29, 2010).

The district court denied the motion. Dkt. No. 31. Petitioner entered a conditional guilty plea to the Section 922(g)(1) charge, preserving his right to appeal the denial of his suppression motion. Dkt. No. 34, at 1, 9 (June 18, 2010). The district court conducted the colloquy required by Federal Rule of Criminal Procedure 11, accepted petitioner's plea, and set the matter for sentencing. Dkt. Nos. 33, 35 (June 18, 2010).

3. a. A conviction for violating Section 922(g)(1) ordinarily exposes the offender to a statutory maximum sentence of ten years of imprisonment. See 18 U.S.C. 924(a)(2). If, however, the offender has at least three prior convictions for a "violent felony" or a "serious drug offense," then the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), requires a minimum sentence of at least 15 years of imprisonment and permits a maximum sentence of life imprisonment. See *Logan* v. *United States*, 552 U.S. 23, 26 (2007); *Custis* v. *United States*, 511 U.S. 485, 487 (1994).

The ACCA defines a "violent felony" to include "any crime punishable by imprisonment for a term exceeding one year * * * that—(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B). Subsection (i) is known as the elements clause. The first half of Subsection (ii) ("is burglary, arson, or extortion, involves use of explosives") is known as the enumerated-crimes clause. The second half of Subsection (ii) ("or otherwise involves conduct that presents a serious potential risk of physical injury to another") is known as the residual clause. See *Johnson* v. *United States*, 135 S. Ct. 2551, 2556 (2015).

b. The Probation Office concluded that petitioner was an armed career criminal because his criminal history included three qualifying "violent felony" convictions: a 2005 Florida conviction for felony battery (PSR ¶ 33), and two 1996 Florida convictions for robbery (PSR ¶¶ 26-27). See PSR ¶ 21, 95-96. As an

armed career criminal, petitioner's offense level of 30 and criminal history category of VI resulted in an advisory guidelines range of 180 to 210 months of imprisonment. PSR ¶¶ 24, 41, 86, 95-96.[1] Petitioner filed written objections to the PSR, in which he argued, as relevant here, that one of his robbery convictions should not be considered a violent felony. J.A. 191a; see PSR ¶ 27.

The information for the robbery conviction described in paragraph 27 of the PSR alleges that petitioner committed "strong armed robbery" when he unlawfully took jewelry from the person or custody of Joshua Cummings by "the use of force, violence, assault, or putting the [victim] in fear," in violation of Fla. Stat. Ann. § 812.13(1) (West 2006). See J.A. 187a. In his sentencing memorandum, petitioner argued that "[n]othing in either the [i]nformation or [j]udgment establishes the manner in which the robbery was committed" and that the Florida Supreme Court had previously stated that, under the Florida robbery statute, "the degree of force used is immaterial." J.A. 184a-185a (citing *Montsdoca* v. *State*, 93 So. 157, 159 (1922), and *Johnson* v. *State*, 612 So. 2d 689, 690 (Fla. Dist. Ct. App. 1993)). Petitioner contended that Florida robbery therefore does not qualify as a violent felony under the ACCA's elements clause because it can be committed without using "violent

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[1] An offense level of 30 and a criminal history category of VI correspond to a guidelines range of 168 to 210 months of imprisonment. See PSR ¶ 86. The ACCA's 15-year statutory mandatory minimum sentence, however, made the effective guidelines range 180 to 210 months of imprisonment. See Sentencing Guidelines § 5G1.1(c)(2) (court may not impose a sentence that is "less than any statutorily required minimum sentence"); J.A. 159a.

force," as required by *Johnson* v. *United States*, 559 U.S. 133, 141-143 (2010) (*Curtis Johnson*). J.A. 184a-185a. Petitioner further argued that Florida robbery "does not necessarily involve purposeful, violent, and aggressive conduct" and is therefore not a violent felony under the ACCA's residual clause. J.A. 185a (citing *Begay* v. *United States*, 553 U.S. 137, 144-145 (2008)).

The government argued that petitioner's robbery conviction qualified as a violent felony under the elements clause. Dkt. No. 41, at 1-3 (Sept. 17, 2010); see 18 U.S.C. 924(e)(B)(i) (ACCA's elements clause covers a crime that "has as an element the use, attempted use, or threatened use of physical force against the person of another"). The government explained that the Florida robbery statute criminalizes "the taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear." Dkt. No. 41, at 1-2 (emphasis omitted) (quoting Fla. Stat. Ann. § 812.13 (West 2006)). Therefore, the government concluded, "[a] defendant convicted of robbery either (a) used physical force, or (b) placed his victim in fear of physical force." *Id.* at 3.

c. Before petitioner's sentencing hearing, the parties entered into an amended plea agreement to reflect that petitioner was potentially subject to an ACCA sentence and should be permitted to re-plead to the Section 922(g) charge following a new Rule 11 colloquy that advised petitioner of the enhanced statutory penalties. J.A. 121a; J.A. 141a-142a; see Fed. R.

Crim. P. 11(b)(1)(H) and (I) (requiring court to advise the defendant of the "maximum possible penalty" and "any mandatory minimum penalty"). The new agreement preserved petitioner's right to challenge his classification as an armed career criminal if petitioner were sentenced under the ACCA. J.A. 141a-142a. The court conducted a second plea colloquy with petitioner pursuant to Rule 11, in which it advised petitioner that he faced a minimum of 15 years and a maximum of life imprisonment under the ACCA, accepted petitioner's guilty plea, and adjudged him guilty. J.A. 142a-144a.

The court then proceeded to sentencing. Petitioner's counsel reiterated his objection to petitioner's classification as an armed-career criminal. As relevant here, counsel elaborated on the arguments made in his sentencing memorandum that petitioner's robbery conviction in 1996-CF-005680, PSR ¶ 27, did not categorically qualify as a "violent felony" because it did not satisfy either the elements clause or the residual clause. See J.A. 148a (Florida robbery can be committed with a "minimal amount of force"); *ibid.* (Florida robbery does not categorically require purposeful, violent, or aggressive conduct). The district court overruled petitioner's objection. J.A. 152a-157a. In response to an inquiry from the government about the precise basis for the court's ruling (*i.e.*, whether petitioner's Florida robbery satisfied the ACCA's elements clause or the residual clause), the court stated, "I think it meets both tests, but if it doesn't meet the * * * elements test, I think it meets the residual test." J.A. 158a. The court sentenced petitioner to 180 months of imprisonment, to be followed

by three years of supervised release. J.A. 132a-133a, 160a.

4. Petitioner appealed on the grounds that, *inter alia*, the district court erred in concluding that his robbery conviction qualified as a violent felony under the ACCA. 683 F.3d at 1310. The court of appeals rejected that contention and affirmed. *Id.* at 1309-1314.[2]

The court of appeals noted that, under this Court's 2010 decision in *Curtis Johnson*, the ACCA's elements clause is triggered only if the statute of conviction requires "*violent* force—that is, force capable of causing physical pain or injury to another person." See 683 F.3d at 1313 (quoting *Curtis Johnson*, 559 U.S. at 140). When petitioner pleaded guilty to robbery in Florida state court in 1996, the court explained, Florida law established that taking by "stealth" (*i.e.*, pickpocketing where the victim is unaware of the theft) was larceny, and not robbery. *Id.* at 1311. The court further observed that the state courts of appeal were divided on whether "snatching" (*i.e.*, taking cash from a person's hand or a purse or jewelry from her body) qualified as robbery. *Ibid.* In 1997, the Florida Supreme Court resolved that issue by holding that mere snatching, without any degree of force beyond what is required to remove the property from another person, did not qualify as robbery. *Id.* at 1311 & n.31 (citing *Robinson* v. *State*, 692 So. 2d 883, 886 (Fla. 1997)

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[2] In the district court, petitioner had also contended that his prior conviction for felony battery (PSR ¶ 33) was not a violent felony. See J.A. 146a-147a, 191a. Petitioner did not pursue that challenge on appeal. See 683 F.3d at 1307 ("Only one of the predicate offenses is challenged in this appeal, a 1996 conviction for Florida strong arm robbery.").

(holding that robbery must "be accomplished with more than the force necessary to remove the property from the person")). And in 1999, the Florida legislature reacted by enacting a new statute defining the crime of "robbery by sudden snatching," which falls somewhere between larceny and robbery. *Id.* at 1311.

The court of appeals assumed, without deciding, that petitioner pleaded guilty to robbery at a time when mere snatching was sufficient to constitute robbery under Florida law. 683 F.3d at 1311-1312. But the court found it unnecessary to decide whether sudden snatching "is sufficiently violent under the elements clause," because "[s]udden snatching ordinarily involves substantial risk of physical injury to the victim" and therefore qualifies as a violent felony under the ACCA's residual clause. *Id.* at 1313. The court therefore affirmed petitioner's conviction and sentence. *Id.* at 1314. This Court denied a petition for a writ of certiorari. 133 S. Ct. 913.

5. On December 20, 2013, petitioner filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255(a). J.A. 79a-100a. He alleged that his guilty plea was invalid because he was misinformed about the possible penalties he faced and that his attorney was ineffective for allowing him to be classified and sentenced as an armed career criminal. J.A. 93a-99a.

a. A magistrate judge recommended that petitioner's motion should be denied. J.A. 28a-69a. The magistrate judge explained that, "even if counsel [for] the defense and the government were unaware early on, when the first Rule 11 proceeding was conducted, that [petitioner] was facing an enhanced sentence as an armed career criminal, certainly by the time the

knowing and voluntary second plea proceeding was concluded, [petitioner] was aware he was facing * * * exposure" to an ACCA sentence of 15 years to life. J.A. 52a. The magistrate judge further explained that, contrary to the allegations underlying petitioner's ineffective-assistance claim, "defense counsel did in fact argue against the enhanced sentence," contending that "the prior state court conviction[] did not qualify as [a] prior crime[] of violence for purposes of the armed career criminal enhancement." *Ibid.* The magistrate judge further concluded that petitioner's ACCA sentence "was proper" and therefore, even assuming counsel had performed deficiently, petitioner had not shown prejudice. J.A. 59a.

b. The district court, after conducting a *de novo* review, adopted the magistrate judge's report and recommendation and denied petitioner's Section 2255 motion. J.A. 25a-27a. The court declined to issue a COA, finding that petitioner could not show that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." J.A. 26a (quoting *Slack* v. *McDaniel*, 529 U.S. 473, 484 (2000)); see 28 U.S.C. 2253(c). On December 23, 2014, petitioner filed a notice of appeal. 13-cv-62770 Docket entry No. 21.

6. On April 21, 2014, this Court granted a petition for a writ of certiorari in *Johnson*, No. 13-7120, to decide whether the Minnesota offense of unlawful possession of a short-barreled shotgun qualified as a "violent felony" under the ACCA's residual clause. 134 S. Ct. 1871. On January 9, 2015, following briefing and oral argument on that issue, the Court restored the case to the calendar for reargument and directed the parties to file supplemental briefs addressing the

question "[w]hether the residual clause in the [ACCA] is unconstitutionally vague." 135 S. Ct. 939.

On January 30, 2015, petitioner, proceeding pro se, filed an application in the court of appeals for a COA. J.A. 17a-22a. Among other assertions, petitioner noted "his armed career offender status," identified his prior Florida convictions for robbery and battery, and asserted that "[t]hese state priors violate *United States v. Johnson*, [No.] 13-720 8th Cir. 536 [Fed.] Appx. 708, 2013, in the United States Supreme Court, pending an April, 2015, oral argument briefing." J.A. 20a. After citing various cases, he argued that "[a]ll of these cases state that [petitioner's] armed career offender status is unconstitutional and violate[s] [petitioner's] Fifth Amendment right to notice of the state priors." *Ibid.*

On March 27, 2015, petitioner filed a motion in which he urged the court of appeals to "hold this case in [a]beyance" pending the forthcoming decision in *Johnson* "based on the fact that [petitioner] was sentenced under the [residual clause] of the ACCA." J.A. 15a. On June 9, 2015, the court of appeals denied petitioner's application for a COA. J.A. 14a. The court stated that petitioner had "failed to make a substantial showing of the denial of a constitutional right." J.A. 14a (citing 28 U.S.C. 2253(c)(2)).

7. On June 26, 2015, this Court held in *Johnson* that the ACCA's residual clause is unconstitutionally vague and that "[i]ncreasing a defendant's sentence under the clause denies due process of law." 135 S. Ct. at 2557. Petitioner filed a motion requesting an extension of time to file a petition for rehearing in light of *Johnson*, which was returned unfiled "because it [wa]s untimely." J.A. 12a-13a.

8. On September 2, 2015, petitioner filed a pro se petition for a writ of certiorari. He challenged the determination that his robbery conviction was a violent felony under the ACCA, and he contended that *Johnson* had announced a new substantive rule of constitutional law that applies retroactively to cases on collateral review. Pet. 5-8. The government filed a memorandum suggesting that, because the court of appeals had denied petitioner's application for a COA before this Court decided *Johnson*, the Court should grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand the case for further consideration in light of *Johnson*. U.S. Mem. 1-3. On January 8, 2016, this Court granted the petition for a writ of certiorari.

SUMMARY OF ARGUMENT

I. *Johnson* announced a substantive rule that applies retroactively to cases on collateral review.

A. Under the framework set forth in *Teague* v. *Lane*, 489 U.S. 288 (1989) (plurality opinion), new rules that govern only procedure are generally not retroactive to cases on collateral review. Procedural rules "are designed to enhance the accuracy of a conviction or sentence by regulating *the manner of determining* the defendant's culpability." *Montgomery* v. *Louisiana*, No. 14-280, 2016 WL 280758, at *8 (Jan. 25, 2016) (citation and internal quotation marks omitted). When a procedural error occurs, the resulting conviction or sentence may still be accurate and therefore lawful, and revisiting prior criminal judgments on collateral review is not justified. In contrast, substantive rules generally apply retroactively to cases on collateral review. Substantive rules forbid certain outcomes regardless of the procedure employed to

impose them. The exemption from *Teague*'s retroactivity bar for substantive rules covers not only new rules that forbid the punishment of certain primary conduct, but also new rules that "prohibit[] a certain category of punishment for a class of defendants because of their status or offense." *Ibid.* (citation and internal quotation marks omitted).

B. The rule announced in *Johnson* is a "new" rule. No prior precedent compelled the Court to hold that the ACCA's residual clause is unconstitutionally vague. To the contrary, before *Johnson*, the Court had twice rejected the argument that the ACCA's residual clause was vague. The Court's holding in *Johnson* therefore broke new ground.

C. The rule in *Johnson* is substantive. Under *Johnson*, the Due Process Clause of the Fifth Amendment bars the imposition of an ACCA sentence (*i.e.*, 15 years to life imprisonment) on prisoners whose classification as armed career criminals depends on the residual clause. The holding of *Johnson* is therefore substantive because it "prohibit[s] a certain category of punishment for a class of defendants because of their status." *Montgomery*, 2016 WL 280758, at *8 (citation and internal quotation marks omitted). Before *Johnson*, a defendant convicted under Section 922(g) who had three or more prior convictions for a serious drug offense or a violent felony, including one or more that satisfied only the residual clause, was required to be sentenced to at least 15 years of imprisonment. Under *Johnson*, however, a defendant convicted under Section 922(g) whose ACCA sentence depends on the residual clause may be sentenced to a maximum term that is no

greater than ten years. That is a substantive change in the law.

That *Johnson*'s rule is substantive is reinforced by the conclusion that it is not procedural. Unlike a procedural rule, where a prisoner's conviction or sentence may still be lawful notwithstanding an error that infected the trial or sentencing, no possibility exists that a sentence of 15 years to life imprisonment remains a valid sentence after *Johnson* for a prisoner whose ACCA sentence depends on the residual clause.

Characterizing the vagueness holding of *Johnson* as a substantive rule accords with *Teague*'s purposes. A prisoner who no longer qualifies for an ACCA sentence under *Johnson* "faces a punishment that the law cannot impose upon him." *Schriro* v. *Summerlin*, 542 U.S. 348, 352 (2004). And refusing to recognize *Johnson* as a substantive rule would raise separation-of-powers concerns. In the federal system, only Congress has the power to define crimes and prescribe punishments. A defendant convicted under 18 U.S.C. 922(g) and who is not eligible for sentencing under the ACCA faces a maximum punishment of ten years of imprisonment. Accordingly, a Section 922(g) defendant who is sentenced to 15 years or more of imprisonment based on a constitutionally infirm sentencing provision is imprisoned for a term unauthorized by any valid statute.

D. *Johnson*'s status as a substantive rule is not undermined by its effect of narrowing the scope of a criminal sentencing statute, rather than placing a specific criminal punishment beyond Congress's power to impose. The Court has recognized that decisions that narrow the scope of a federal criminal statute create substantive rules that are retroactive on collat-

eral review. By the same principle, pre-*Johnson* decisions of this Court narrowing the reach of the ACCA's residual clause as a matter of statutory interpretation were substantive rules. It would be highly anomalous if this Court's statutory-construction decisions narrowing the residual clause received retroactive effect, but the holding of *Johnson* invalidating that clause entirely did not. That conclusion is reinforced by examining the range of constitutional rules deemed retroactive by Justice Harlan in his concurrence in *Mackey* v. *United States*, 401 U.S. 667, 693 & n.8 (1971) (Harlan, J., concurring in part and dissenting in part), which formed the basis for *Teague*'s exemption for substantive rules.

One court of appeals has reasoned that *Johnson*'s holding is not a substantive rule because Congress remains free to impose a 15-year sentence on a defendant with the same prior convictions if it uses language that is not vague. *In re Williams*, 806 F.3d 322, 325-326 (5th Cir. 2015). That reasoning is unsound. This Court's decision in *Bousley* v. *United States*, 523 U.S. 614 (1998), confirms that new rules narrowing the scope of a federal criminal offense have substantive effect, even if Congress could validly amend the statute to prohibit the defendant's conduct. By virtue of the Ex Post Facto Clause, any future amendment of the ACCA cannot apply to defendants who formerly qualified for an enhanced sentence based on the residual clause. As to that class of defendants, *Johnson* forbids the imposition of a 15-year sentence and it is therefore a substantive rule.

E. This case arises in the context of the denial of a COA. Although the Court need only decide that "reasonable jurists could debate" whether *Johnson* is

substantive such that a COA should issue, see *Slack* v. *McDaniel*, 529 U.S. 473, 483-484 (2000), the Court could provide a path for prisoners who need authorization to file second or successive Section 2255 motions by concluding that all reasonable jurists would agree that *Johnson* is substantive, or by simply holding that *Johnson* is a substantive rule in ACCA cases. A ruling in petitioner's favor on that basis would "ma[k]e" *Johnson* retroactive in ACCA cases, thus permitting prisoners to satisfy the gatekeeping requirements of 28 U.S.C. 2255(h)(2) and thereby file timely second or successive motions.

II. On petitioner's direct appeal, the court of appeals did not decide whether the Florida robbery statute required the use of violent force sufficient to satisfy the ACCA's elements clause at the time of petitioner's 1996 conviction for robbery. Now that the residual clause has been invalidated, the court of appeals will need to address that question. Because the court of appeals upheld petitioner's ACCA sentence under the residual clause, and because the court of appeals has not yet analyzed in petitioner's case whether the Florida robbery statute is a violent felony under the elements clause, the Court should vacate the judgment below and leave that issue for resolution by that court.

ARGUMENT

I. *JOHNSON* ANNOUNCED A NEW SUBSTANTIVE RULE OF CONSTITUTIONAL LAW THAT APPLIES RETROACTIVELY TO CASES ON COLLATERAL REVIEW

In *Johnson* v. *United States*, 135 S. Ct. 2551 (2015), the Court held that the ACCA's residual clause is unconstitutionally vague and, consequently, "imposing an increased sentence under the residual clause * * *

violates the Constitution's guarantee of due process." *Id.* at 2563. Under the rule of *Teague* v. *Lane*, 489 U.S. 288 (1989) (plurality opinion),[3] *Johnson* applies to cases on collateral review because it is a substantive decision. *Johnson* holds that the Due Process Clause of the Fifth Amendment bars the imposition of an ACCA sentence on a defendant whose classification as an armed career criminal depends on the residual clause. See 135 S. Ct. at 2560. *Johnson* therefore "prohibit[s] a certain category of punishment for a class of defendants because of their status" and qualifies as a substantive rule. See *Montgomery* v. *Louisiana*, No. 14-280, 2016 WL 280758, at *8 (Jan. 25, 2016) (citation and internal quotation marks omitted).[4]

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[3] Although *Teague* was a plurality opinion, the Court adopted the *Teague* plurality's approach to retroactivity shortly thereafter in *Penry* v. *Lynaugh*, 492 U.S. 302, 313 (1989), abrogated on other grounds, *Atkins* v. *Virginia*, 536 U.S. 304, 312-313 (2002). See *Danforth* v. *Minnesota*, 552 U.S. 264, 266 n.1 (2008). This brief's citations to *Teague* refer to Justice O'Connor's plurality opinion.

[4] Three courts of appeals have determined, in the course of deciding whether to authorize the filing of a second or successive Section 2255 motion, that *Johnson* announced a new substantive rule that applies retroactively to cases on collateral review, at least in an initial Section 2255 motion. See *In re Watkins*, No. 15-5038, 2015 WL 9241176, at *3-*4 (6th Cir. Dec. 17, 2015); *Price* v. *United States*, 795 F.3d 731, 734-735 (7th Cir. 2015); *In re Rivero*, 797 F.3d 986, 989-991 (11th Cir. 2015); see also *In re Franks*, No. 15-15456, 2016 WL 80551, at *2 (11th Cir. Jan. 6, 2016). One court of appeals, considering a case in the same posture, has reached the opposite conclusion. *In re Williams*, 806 F.3d 322, 325-326 (5th Cir. 2015).

A. New Substantive Rules Apply Retroactively To Cases On Collateral Review

Retroactivity principles apply differently to cases that are pending on direct and collateral review. In *Griffith* v. *Kentucky*, 479 U.S. 314 (1987), the Court held that a "new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final." *Id.* at 328. *Griffith*'s approach to retroactivity for cases not yet final extends to all new rules, regardless of whether the rule is substantive or procedural. See, *e.g.*, *Johnson* v. *United States*, 520 U.S. 461, 467 (1997) (expressing "no doubt" that a decision announcing a new procedural rule is retroactive to cases not yet final); *Powell* v. *Nevada*, 511 U.S. 79, 84 (1994) (same).

The judgment against petitioner, however, became final in January 2013, more than two and a half years before *Johnson* was decided, when this Court denied a petition for a writ of certiorari on direct review. See *Clay* v. *United States*, 537 U.S. 522, 527 (2003) ("Finality attaches when this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires."). In such cases, respect for the finality interests in the judgment dictates a different, more restrictive approach, under which new rules of criminal procedure generally are not applied retroactively. See *Teague*, 489 U.S at 310.

Teague recognized that the retroactivity calculus changes once direct review is complete, because "[a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the

operation of our criminal justice system." 489 U.S. at 309. Drawing on an approach earlier articulated by Justice Harlan, see *Mackey* v. *United States*, 401 U.S. 667, 675 (1971) (Harlan, J., concurring in part and dissenting in part); *Desist* v. *United States*, 394 U.S. 244, 256 (1969) (Harlan, J., dissenting), *Teague* charted a different approach to the retroactivity of "new rules"—that is, rules not "dictated by precedent existing at the time the defendant's conviction became final." 489 U.S. at 301 (emphasis omitted); see *id.* at 314 n.2 ("[A] criminal judgment necessarily includes the sentence imposed upon the defendant."). Under that approach, the retroactivity of a new rule to cases on collateral review differs depending on whether the rule is "procedural" or "substantive." *Id.* at 311-313; cf. *Bousley* v. *United States*, 523 U.S. 614, 620 (1998) ("Th[e] distinction between substance and procedure is an important one in the habeas context.").[5]

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[5] Although *Teague* addressed petitions for writs of habeas corpus filed by state prisoners under 28 U.S.C. 2254(a), in *Danforth*, this Court recognized that the lower courts have applied *Teague* to Section 2255 motions and observed that much of *Teague*'s reasoning "seems equally applicable" to motions under Section 2255. 552 U.S. at 281 n.16; see also *Chaidez* v. *United States*, 133 S. Ct. 1103, 1107 (2013) (applying *Teague* to a federal prisoner's petition for a writ of error coram nobis). That position makes sense. *Teague* is grounded substantially in considerations of finality, and "the Federal Government, no less than the States, has an interest in the finality of its criminal judgments." *United States* v. *Frady*, 456 U.S. 152, 166 (1982). In addition, *Teague* "adopt[ed] Justice Harlan's view of retroactivity for cases on collateral review," 489 U.S. at 310, and Justice Harlan did not "make any distinction, for retroactivity purposes, between state and federal prisoners seeking collateral relief," *Mackey*, 401 U.S. at 681 n.1 (opinion of Harlan, J.).

1. Under the *Teague* framework, "new constitutional rules of criminal *procedure* will not be applicable to those cases which have become final before the new rules are announced," 489 U.S. at 310 (emphasis added), unless the new procedural rule falls within a narrow exception for "watershed rules" that "implicat[e] the fundamental fairness and accuracy of the criminal proceedings," *Schriro* v. *Summerlin*, 542 U.S. 348, 352 (2004) (citations omitted); see *Teague*, 489 U.S. at 311-314. That exception is limited to procedural rules that are "necessary to prevent an impermissibly large risk of an inaccurate conviction" and that "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Whorton* v. *Bockting*, 549 U.S. 406, 418 (2007) (citations and internal quotation marks omitted).

2. New substantive rules, however, "generally apply retroactively" and are "not subject to [*Teague*'s] bar." *Summerlin*, 542 U.S. at 351-352 n.4; see *Teague*, 489 U.S. at 311. *Teague* referred to substantive rules as an "exception" to the principle of nonretroactivity. See 489 U.S. at 311. But because *Teague* is only concerned with procedural rules, the Court has since clarified that substantive rules are "more accurately characterized" as exempt from *Teague*'s bar on retroactive application of procedural rules, rather than an exception to it. *Montgomery*, 2016 WL 280758, at *5 (citing *Summerlin*, 542 U.S. at 352 n.4); see also *Bousley*, 523 U.S. at 620 ("*Teague* by its terms applies only to procedural rules").

The Court explained in *Montgomery* that, as originally defined by Justice Harlan, substantive constitutional rules are rules "that place, as a matter of constitutional interpretation, certain kinds of primary, pri-

vate individual conduct beyond the power of the criminal law-making authority to proscribe." 2016 WL 280758, at *8 (quoting *Mackey*, 401 U.S. at 692 (opinion of Harlan, J.)). *Montgomery* further explained that, four months after *Teague*, the Court extended the exemption for substantive rules "to cover not only rules forbidding criminal punishment of certain primary conduct but also rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Ibid.* (quoting *Penry* v. *Lynaugh*, 492 U.S. 302, 330 (1989), abrogated on other grounds, *Atkins* v. *Virginia*, 536 U.S. 304, 312-313 (2002)). Both classes of rules, the Court explained, reflect "substantive categorical guaranties" that "deprive[] the State of the power to impose a certain penalty," "regardless of the procedures followed." *Ibid.* (quoting *Penry*, 492 U.S. at 329-330). Accordingly, a rule that "alters the range of conduct or the class of persons that the law punishes" is a substantive rule. *Summerlin*, 542 U.S. at 353; see *Montgomery*, 2016 WL 280758, at *11.

Substantive conduct-protecting constitutional rules include those cited by Justice Harlan in his separate opinion in *Mackey*, for example, *Griswold* v. *Connecticut*, 381 U.S. 479 (1965) (right of married couples to use contraception), and *Loving* v. *Virginia*, 388 U.S. 1 (1967) (invalidating ban on interracial marriage). See *Mackey*, 401 U.S. at 692 n.7 (opinion of Harlan, J.) (citing those cases, among others). Substantive penalty-restricting constitutional rules include decisions holding that the Eighth Amendment bars life without parole or the death penalty for certain classes of offenders. See, *e.g.*, *Montgomery*, 2016 WL 280758, at *13 (barring life without parole for juveniles con-

victed of homicide but who are not incorrigible); *Roper* v. *Simmons*, 543 U.S. 551 (2005) (barring death penalty for juveniles); *Atkins* v. *Virginia*, 536 U.S. 304 (2002) (barring death penalty for persons who are intellectually disabled).

New substantive rules can also result from "decisions that narrow the scope of a [federal] criminal statute by interpreting its terms." *Summerlin*, 542 U.S. at 351. This Court recognized that such substantive holdings apply retroactively in *Bousley*. See 523 U.S. at 620-621. *Bousley* considered whether *Teague* barred retroactive application of *Bailey* v. *United States*, 516 U.S. 137 (1995), which interpreted the "use" element of 18 U.S.C. 924(c) (prohibiting "us[ing] or carr[ying] a firearm" "during and in relation to any crime of violence or drug trafficking crime"). *Bailey* held that a violation of Section 924(c) requires evidence of "active employment of the firearm by the defendant," rather than mere possession, 516 U.S. at 143 (emphasis omitted), thus rejecting the test applied by the court below and some other courts of appeals, *id.* at 141-142. In *Bousley*, this Court concluded that *Bailey*'s holding resembled a decision that placed "conduct beyond the power of the criminal law-making authority to proscribe," and thus applied retroactively, because under the separation of powers, only Congress and not the judiciary has power to define federal crimes. 523 U.S. at 620-621 (internal quotation marks omitted).

Substantive rules apply retroactively because they "'necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal' or faces a punishment that the law cannot impose upon him." *Summerlin*, 542 U.S. at 352 (quot-

ing *Bousley*, 523 U.S. at 620). In those circumstances, the finality interests underlying *Teague* must yield because "[t]here is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose." *Montgomery*, 2016 WL 280758, at *11 (quoting *Mackey*, 401 U.S. at 693 (opinion of Harlan, J.)); see also *Penry*, 492 U.S. at 330 (finality concerns underlying *Teague* "have little force" with respect to substantive rules).

3. In contrast, new procedural rules "are designed to enhance the accuracy of a conviction or sentence by regulating 'the *manner of determining* the defendant's culpability.'" *Montgomery*, 2016 WL 280758, at *8 (quoting *Summerlin*, 542 U.S. at 353). Procedural rules regulate the process for making the ultimate determination (guilt or innocence, or the statutory sentencing range). For example, a rule requiring cross-examination of an out-of-court declarant, see *Crawford* v. *Washington*, 541 U.S. 36 (2004), or a jury finding beyond a reasonable doubt on the relevant penalty-enhancing fact, see *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), is a procedural rule. Such rules do not alter the authorized range of possible outcomes.

New procedural rules, therefore, "merely raise the possibility" that the now-invalid procedure might have altered the outcome of the proceeding. *Summerlin*, 542 U.S. at 352. They thus have a "more speculative connection to innocence" or sentencing eligibility. *Ibid.* As this Court has explained, "[e]ven where procedural error has infected a trial, the resulting conviction or sentence may still be accurate; and by extension, the defendant's continued confinement may still be lawful." *Montgomery*, 2016 WL 280758, at *8.

Accordingly, finality concerns justify withholding retroactive effect to new procedural rules, outside of the rarely invoked "watershed" category. See *Teague*, 489 U.S. at 309-310; see also *Summerlin*, 542 U.S. at 352 (noting that "it is unlikely that any [new watershed procedural rule] has yet to emerge") (citation, internal quotation marks, and ellipses omitted).

B. *Johnson* Announced A "New" Constitutional Rule

Whether a rule applies retroactively depends initially on whether it is "new." See, *e.g.*, *Chaidez* v. *United States*, 133 S. Ct. 1103, 1107 (2013). A rule is "new" when it "breaks new ground or imposes a new obligation" on the government, meaning that it was not "*dictated* by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U.S. at 301. A rule is "dictated by precedent" only if the rule "would have been apparent to all reasonable jurists" who considered the issue. *Chaidez*, 133 S. Ct. at 1107 (citation and internal quotation marks omitted); *Lambrix* v. *Singletary*, 520 U.S. 518, 527-538 (1997).

The rule announced in *Johnson* was unquestionably "new." The holding in *Johnson* was not dictated by precedent; to the contrary, it required the overruling of precedent. Before *Johnson*, the Court had twice rejected the argument that the ACCA's residual clause was unconstitutionally vague when that argument was pressed in dissenting opinions. See *James* v. *United States*, 550 U.S. 192, 210 n.6 (2007) ("While ACCA requires judges to make sometimes difficult evaluations of the risks posed by different offenses, we are not persuaded by Justice Scalia's suggestion * * * that the residual provision is unconstitutionally vague."); see also *Sykes* v. *United States*, 564 U.S. 1,

15-16 (2011). To conclude as it did, *Johnson* had to overrule "[the] contrary holdings in *James* and *Sykes*." *Johnson*, 135 S. Ct. at 2563. "The explicit overruling of an earlier holding no doubt creates a new rule." *Saffle* v. *Parks*, 494 U.S. 484, 488 (1990); accord *Graham* v. *Collins*, 506 U.S. 461, 467 (1993). Applying those principles, "*Johnson* announce[d] a new rule: It explicitly overrule[d] [a] line of Supreme Court decisions * * * and it broke new ground by invalidating a provision of ACCA." *Price* v. *United States*, 795 F.3d 731, 732 (7th Cir. 2015).

C. *Johnson* Announced A "Substantive" Rule For ACCA-Enhanced Sentences

When a prisoner's ACCA sentence depends on one or more prior convictions that qualified as violent felonies under the ACCA's residual clause, the holding of *Johnson* invalidating the residual clause for vagueness under the Due Process Clause is a substantive, penalty-restricting constitutional rule. *Johnson* therefore has retroactive effect in cases on collateral review challenging an ACCA sentence.

1. As discussed above, pp. 17-24, *supra*, the exemption for substantive rules from *Teague*'s general bar on retroactivity covers "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Penry*, 492 U.S. at 329-330; see *Montgomery*, 2016 WL 280758, at *5. A new penalty-restricting rule is substantive "if it alters the range of conduct or the class of persons that the law punishes." *Summerlin*, 542 U.S. at 353; *Montgomery*, 2016 WL 280758, at *11.

Johnson's invalidation of the residual clause is a substantive rule because, under the holding of *Johnson*, the Fifth Amendment's Due Process Clause bars

the imposition of an ACCA sentence (*i.e.*, a term of imprisonment of 15 years to life, see 18 U.S.C. 924(e)), on prisoners whose classification as armed career criminals depends on the residual clause. *Johnson* held that "imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process." 135 S. Ct. at 2563; see *id.* at 2557 ("Increasing a defendant's sentence under the clause denies due process of law."). The holding of *Johnson* thus "prohibit[s] a certain category of punishment for a class of defendants because of their status." *Penry*, 492 U.S. at 330; see *In re Watkins*, No. 15-5038, 2015 WL 9241176, at *6 (6th Cir. Dec. 17, 2015) (*Johnson* is a substantive rule because it "prohibits the imposition of an increased sentence on those defendants whose *status* as armed career criminals is dependent on offenses that fall within the residual clause."); *Price*, 795 F.3d at 734 ("In deciding that the residual clause is unconstitutionally vague, the Supreme Court prohibited 'a certain category of punishment for a class of defendants because of their status.'") (quoting *Saffle*, 494 U.S. at 494).

Before *Johnson*, a defendant convicted under 18 U.S.C. 922(g) who had three or more prior convictions for a serious drug offense or a violent felony—including a violent felony that qualified only under the ACCA's residual clause—faced a minimum of 15 years of imprisonment and could be sentenced to any term of imprisonment from 15 years to life. See 18 U.S.C. 924(e). After *Johnson*, however, a defendant convicted under Section 922(g) whose ACCA sentence depended on the residual clause can be sentenced only to a maximum of ten years of imprisonment. See 18

U.S.C. 924(a)(2). That is a substantive change in the law. It "alters * * * the class of persons," *Summerlin*, 542 U.S. at 353, authorized to be punished under the ACCA with an enhanced sentence of 15 years to life by removing from that class persons who qualify only by virtue of a residual-clause conviction.

Subjecting a defendant whose ACCA sentence depends on the residual clause to 15 years or more of imprisonment violates the Constitution. See *Johnson*, 135 S. Ct. at 2560 ("Invoking so shapeless a provision to condemn someone to prison for 15 years to life does not comport with the Constitution's guarantee of due process."). As the Court explained in *Montgomery*, "when a State enforces a proscription or penalty barred by the Constitution, the resulting conviction or sentence is, by definition, unlawful." 2016 WL 280758, at *8. And "[a] penalty imposed pursuant to an unconstitutional law is no less void because the prisoner's sentence became final before the law was held unconstitutional." *Id.* at *10.

2. That *Johnson* announced a substantive rule is reinforced by the conclusion that it clearly is not a procedural rule. Procedural rules "are designed to enhance the accuracy of a conviction or sentence by regulating 'the *manner of determining* the defendant's culpability.'" *Montgomery*, 2016 WL 280758, at *8 (quoting *Summerlin*, 542 U.S. at 353). Unlike a procedural rule, where a prisoner's "conviction or sentence may still be accurate" and his "continued confinement may still be lawful" notwithstanding an error that infected a trial or sentencing proceeding, *ibid.*; see *Summerlin*, 542 U.S. at 352, the rule in *Johnson* eliminates the possibility of imposing a valid sentence of 15 years to life imprisonment for a prison-

er whose ACCA sentence depends on the residual clause. The effect of *Johnson* is not to impose a higher burden of proof, alter the admissible evidence, or change the factfinder—classic procedural rules. Rather, *Johnson*'s effect is to strike the residual clause entirely as "void for vagueness." 135 S. Ct. at 2562.[6]

The holding of *Johnson* does have a procedural component, in that it requires a court to determine whether a defendant belongs to the class of prisoners whose ACCA sentences depended on the residual clause. In this case, for example, further procedures will be required to determine whether petitioner remains eligible for an ACCA sentence because his prior conviction for Florida robbery may satisfy the ACCA's elements clause. See Part II, *infra*; see *Johnson*, 135 S. Ct. at 2563 (decision invalidating the resid-

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[6] The substantive, non-procedural character of *Johnson* is evident from considering how Section 924(e)(2)(B) reads in light of the Court's decision that the residual clause is "void." The provision now covers a "crime punishable by imprisonment for a term exceeding one year * * * that"—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, ~~or otherwise involves conduct that presents a serious potential risk of physical injury to another~~[.]

135 S. Ct. at 2563 (noting that the Court's decision "does not call into question application of the Act to the four enumerated offenses, or the remainder of the Act's definition of a violent felony"). No quantum of evidence can expose a defendant to an ACCA sentence based on a conviction that qualified only under the voided language, for "[a]n unconstitutional law is void, and is as no law." *Montgomery*, 2016 WL 280758, at *10 (quoting *Ex parte Siebold*, 100 U.S. 371, 376 (1880)).

ual clause "does not call into question * * * the remainder of the [ACCA]'s definition of a violent felony"). The existence of "a procedural requirement necessary to implement a substantive guarantee," however, does not transform *Johnson*'s substantive holding into a procedural rule. See *Montgomery*, 2016 WL 280758, at *14. Any suggestion that *Johnson* is procedural because of the need for a sentencer to determine whether the defendant "falls within the category of persons whom the law may no longer punish" "conflates a procedural requirement necessary to implement a substantive guarantee with a rule that regulates only the manner of determining the defendant's culpability." *Ibid.* (citation, internal quotation marks, and emphasis omitted).

3. Characterizing the vagueness holding of *Johnson* as substantive accords with *Teague*'s objectives. Substantive rules apply retroactively because they "'necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal' or faces a punishment that the law cannot impose upon him." *Summerlin*, 542 U.S. at 352 (quoting *Bousley*, 523 U.S. at 620). In those circumstances, the finality interests underlying *Teague* should yield. *Montgomery*, 2016 WL 280758, at *11; *Penry*, 492 U.S. at 330. Prisoners with ACCA sentences that depend on the now-invalid residual clause "face[] a punishment that the law cannot impose upon [them]." *Summerlin*, 542 U.S. at 352. Such defendants will serve at least five years longer than the penalty that Congress validly authorized for their underlying offenses. Collateral review is warranted to correct that error because "little societal interest" exists "in permitting the criminal process to rest at a point where it

ought properly never to repose." *Montgomery*, 2016 WL 280758, at *11 (quoting *Mackey*, 401 U.S. at 693 (opinion of Harlan, J.)).

Beyond that deprivation of liberty, the refusal to recognize *Johnson* as a substantive rule would raise separation-of-powers concerns. In the federal system, "[i]t is the legislature, not the Court, which is to * * * ordain [the] punishment [for a crime]." *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (Marshall, C.J.); see also *Whalen* v. *United States*, 445 U.S. 684, 689 (1980) ("the power * * * to prescribe the punishments to be imposed upon those found guilty of [federal crimes] resides wholly with the Congress"). Accordingly, "a defendant may not receive a greater sentence than the legislature has authorized." *United States* v. *DiFrancesco*, 449 U.S. 117, 139 (1980). Leaving in place an invalid ACCA sentence that relies on a statute later held to be void for vagueness violates those principles. A judicial error in applying a statute cannot justify refusing to correct a sentence that exceeds the maximum term validly authorized by Congress for that offender.

D. *Johnson* Is A Substantive Rule Notwithstanding That It Does Not Protect Future Defendants From ACCA Punishment Based On Their Prior Convictions

In *Montgomery*, this Court stated that "[s]ubstantive rules * * * set forth categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the State's power to impose." 2016 WL 280758, at *8. The rule in *Johnson* does not prevent Congress from amending the ACCA prospectively to encompass some or all of the convictions ruled ineligible for enhancement by *Johnson*, provided that it does so with sufficiently precise and

constitutionally valid language. But that possibility does not undermine the substantive character of *Johnson* itself. The Court's holding prevents the imposition of ACCA punishment on defendants who are covered by its rule, and those defendants have therefore received "a punishment that the law cannot impose" on them. *Summerlin*, 542 U.S. at 352.

1. While *Johnson* involved a constitutional rule, its effect is comparable to a rule that narrows the scope of ACCA as a matter of statutory construction. Before *Johnson*, certain convictions qualified under the residual clause; after *Johnson*, none do. The effect of *Johnson*'s rule is identical to (but more sweeping than) the effect of *Begay* v. *United States*, 553 U.S. 137 (2008), and *Chambers* v. *United States*, 555 U.S. 122 (2009), each of which narrowed the construction of the residual clause with the effect of excluding certain convictions from qualifying for the enhancement. See *Begay*, 553 U.S. at 148 (New Mexico crime of driving under the influence "falls outside the scope" of the residual clause); *Chambers*, 555 U.S. at 130 (Illinois failure-to-report offense "falls outside the scope" of the residual clause); see also *Johnson*, 135 S. Ct. at 2556.

The narrowing constructions in *Begay* and *Chambers* constituted new substantive rules, on the same principle that this Court adopted in holding that "decisions that narrow the scope of a [federal] criminal statute" constitute new substantive rules. *Summerlin*, 542 U.S. at 351; see *Bousley*, 523 U.S. at 620-621. Both types of rules "necessarily carry a significant risk that a defendant stands convicted," or received a sentence, "for an act that the law does not make criminal" or authorize to be punished. 523 U.S. at 620

(citation and internal quotation marks omitted). Congress, "and not the courts," has the power to define federal crimes and accompanying punishments. *Id.* at 620-621; see p. 30, *supra*. It follows that a substantive penalty-restricting rule produced by a statutory interpretation that narrows the scope of a federal sentencing provision is exempt from *Teague*'s general bar on retroactivity because it places a particular penalty off limits. Cf. *Montgomery*, 2016 WL 280758, at *8 (addressing constitutional rules that "prohibit[] a certain category of punishment for a class of defendants because of their status") (quoting *Penry*, 492 U.S. at 329). Accordingly, both *Begay* and *Chambers* constituted new substantive rules that were retroactive in ACCA cases on collateral review. And before *Johnson*, lower courts so held, granting collateral relief to defendants whose sentences were erroneously enhanced under the ACCA.[7]

Just as *Begay* and *Chambers* "alter[ed] * * * the class of persons that the law punishes" and thereby created a class of prisoners who received sentences that "the law cannot impose upon [them]," *Summerlin*, 542 U.S. at 352-353, so does *Johnson*. It would be highly incongruous if statutory-construction decisions

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[7] See *Mackey* v. *Warden*, 739 F.3d 657, 662 (11th Cir. 2014), and *Bryant* v. *Warden*, 738 F.3d 1253, 1277-1278 (11th Cir. 2013) (both applying circuit precedent interpreting *Begay* in collateral review of ACCA sentences under 28 U.S.C. 2241); see also *Welch* v. *United States*, 604 F.3d 408, 415 (7th Cir. 2010) (same, in motion under 28 U.S.C. 2255), cert. denied, 131 S. Ct. 3019 (2011); *United States* v. *Shipp*, 589 F.3d 1084, 1091 (10th Cir. 2009) (finding *Chambers* to be a substantive rule, applicable on motion under Section 2255, because in light of *Chambers*, the defendant has "received 'a punishment that the law cannot impose upon him'") (quoting *Summerlin*, 542 U.S. at 352).

like *Begay* and *Chambers* were afforded retroactive effect because they narrowed the scope of the ACCA's residual clause as a matter of statutory interpretation, but the constitutional holding of *Johnson* invalidating the clause in its entirety did not. Both types of decisions narrow a penalty provision and create a subset of prisoners who fall outside the "class of persons that the law punishes." *Summerlin*, 542 U.S. at 353.

2. The conclusion that a substantive rule need not place a punishment beyond legislative reach for all time is reinforced by Justice Harlan's own explanation of a substantive rule. See *Montgomery*, 2016 WL 280758, at *8 (noting origins of *Teague*'s category of substantive rules in Justice Harlan's approach). In *Mackey*, Justice Harlan cited several cases in support of his description of substantive constitutional rules as those placing "conduct beyond the power of the criminal law-making authority to proscribe." See *Mackey*, 401 U.S. at 692-693 & nn.7-8 (opinion of Harlan, J.). One example that Justice Harlan cited in explaining that the writ of habeas corpus had historically been available for attacking convictions "on such grounds" was *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886). See *Mackey*, 401 U.S. at 692-693 & n.8.

In *Yick Wo*, the petitioners were imprisoned for violating San Francisco ordinances that required a license to operate laundry businesses in wooden buildings. 118 U.S. at 366. The Court held that the petitioners were entitled to habeas corpus relief because the ordinances as written and administered amounted to "a practical denial by the state of that equal protection of the laws" secured by the Fourteenth Amendment. *Id.* at 373. In so holding, the Court explained that the ordinance conferred on officials "a naked and

arbitrary power" that "acknowledge[d] neither guidance nor restraint," *id.* at 366-367, and that was employed by the board of supervisors to deny licenses to all Chinese applicants, while granting licenses to non-Chinese applicants, *id.* at 374. The Court accordingly concluded that "the imprisonment of the petitioners" for violating the license law was "illegal, and they must be discharged." *Ibid.* The petitioners in *Yick Wo* were entitled to habeas relief not because it was beyond the power of the State to require a license for the operation of a laundry in a building made of wood. Rather, they were entitled to relief because the municipal law provided no standards to govern the decisionmaker's discretion and it was employed for discriminatory purposes.

A decision invalidating a criminal law on equal protection grounds may often have the character of a substantive constitutional holding, even though a law regulating the same conduct through a different classification might be upheld. For example, in *McLaughlin* v. *Florida*, 379 U.S. 184 (1964), this Court invalidated a state law prohibiting interracial cohabitation as a denial of equal protection, while noting that other state provisions, that were "neutral as to race" and that "express[ed] a general and strong state policy against promiscuous conduct, * * * if enforced, would reach illicit relations of any kind." *Id.* at 196. The possibility that the defendant's conduct might be reached under a different statute that regulated the conduct in an evenhanded manner does not detract from the substantive character of the Court's decision—or justify leaving in force a conviction under a statute that violated the Equal Protection Clause on the premise that a more neutral statute might be

enacted. A defendant should be able to attack such a conviction on habeas, even if the underlying conduct might not be protected against all regulation.

That reasoning applies fully to the residual clause. Defendants with prior convictions are not immune from recidivist enhancements. But this Court determined that ACCA's residual clause was a "shapeless" enhancement provision with "hopeless indeterminacy"; it therefore created "unavoidable uncertainty and arbitrariness of adjudication" and reflected a "'judicial morass that defies systemic solution,' 'a black hole of confusion and uncertainty' that frustrates any effort to impart 'some sense of order and direction.'" *Johnson*, 135 S. Ct. at 2558, 2560, 2562 (quoting *United States* v. *Vann*, 660 F.3d 771, 787 (4th Cir. 2011) (Agee, J., concurring)). Even some crimes that arguably presented "straightforward" cases for residual-clause coverage, the Court concluded, dissolve into uncertainty upon closer inspection. *Id.* at 2561 (discussing Connecticut offense of "rioting at a correctional institution," which "certainly sounds like a violent felony," but might not be in light of Connecticut's definition of the offense to include taking part in "any disorder" or "organized disobedience"). Accordingly, the Court invalidated the residual clause across the board. The possibility that Congress could restore enhanced punishment for a conviction for possession of a short-barreled shotgun, the offense at issue in *Johnson*, 135 S. Ct. at 2556, or any other conviction formerly covered only under the residual clause, would not restore ACCA eligibility to Johnson himself, or anyone like him.

3. One court of appeals has held otherwise, but its reasoning does not withstand analysis. In *In re Wil-*

liams, 806 F.3d 322 (2015), the Fifth Circuit held, in the context of denying an application for authorization to file a second or successive Section 2255 motion, that the holding of *Johnson* is not a substantive rule that applies retroactively on collateral review. *Id.* at 325-326; see 28 U.S.C. 2255(h)(2) (courts of appeals may authorize a second or successive Section 2255 motion if the prisoner's claim relies on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable"). The court reasoned that "*Johnson* does not forbid the criminalization of any of the conduct covered by the ACCA." *Id.* at 325. To the contrary, the court explained, because *Johnson* invalidated the residual clause on vagueness grounds, Congress is free after *Johnson* to impose a 15-year sentence on a defendant with the same prior convictions as Williams if it does so using language that is not vague. *Id.* at 325-326. According to the Fifth Circuit, *Johnson* therefore did not announce a substantive rule because it does not "forbid a certain category of punishment" for the class of defendants that have the same prior convictions as Williams. *Ibid.*[8]

For the reasons explained above, the Fifth Circuit's reasoning is unsound. Congress's ability to amend ACCA is no more relevant to *Johnson*'s substantive nature than is Congress's ability to amend a substantive criminal law after a decision of this Court that narrows its scope. In *Bousley*, for example, the Court

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[8] Williams requested this Court to issue a petition for a writ of mandamus or an original writ of habeas corpus to review that holding, but, after requesting a response from the government to the mandamus petition, this Court denied both petitions. See *In re Williams*, Nos. 15-758 & 15-759 (Jan. 11, 2016).

held that its decision in *Bailey*, which narrowed the construction of "use" a firearm in 18 U.S.C. 924(c)(1) to exclude possession offenses, was "substantive" and retroactive, see 523 U.S. at 620-621, even though Congress could have amended (and in fact later did amend) Section 924(c)(1) to restore possession offenses to the statute. See *United States* v. *O'Brien*, 560 U.S. 218, 232-233 (2010) (discussing the post-*Bailey* amendment colloquially known as the "Bailey Fix Act"). The Fifth Circuit distinguished *Bousley* because it believed that *Bousley* "was decided completely outside of the *Teague* framework." *Williams*, 806 F.3d at 326. But in *Summerlin*, this Court cited *Bousley* to explain that "[n]ew *substantive* rules generally apply retroactively" and that "[t]his includes decisions that narrow the scope of a criminal statute by interpreting its terms." 542 U.S. at 351-352; see also *id.* at 352 n.4.

Congress's power to amend the ACCA to cure any vagueness issue does not prevent the holding of *Johnson* from being substantive because such an amendment could never apply to Johnson or to the class of prisoners who committed their Section 922(g) offenses before any such hypothetical amendment. By virtue of the Ex Post Facto Clause, U.S. Const. Art. 1, § 9, Cl. 3, any future amendment of the ACCA that might expand the type of convictions that qualify as predicate offenses cannot apply retroactively to defendants who formerly qualified for ACCA because of the residual clause. See *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386, 390 (1798) (ex post facto law includes a law that "changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed"); see also *Peugh* v. *United States*, 133 S.

Ct. 2072, 2081 (2013) (ex post facto law is "a term of art with an established meaning at the time of the framing" and applying altered-punishment category of ex post facto laws from *Calder*) (internal quotation marks omitted). For that class of defendants, *Johnson* "prohibit[s] a certain category of punishment" and constitutes a substantive, retroactive rule. *Penry*, 492 U.S. at 330. Accordingly "Congress'[s] ability to amend ACCA in a manner that would constitutionally impose the category of punishment [a prisoner] seeks to challenge is irrelevant to the retroactivity analysis." *Watkins*, 2015 WL 9241176, at *6.[9]

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[9] This case does not present any issue concerning whether *Johnson* is retroactive to cases on collateral review where a defendant faced an enhanced range because of the residual clause in the federal Sentencing Guidelines. See Sentencing Guidelines § 4B1.2(a)(2) (defining "crime of violence" to include convictions covered by an identical residual clause to the ACCA's residual clause); see also 81 Fed. Reg. 4741, 4743 (Jan. 27, 2016) (Sentencing Commission amendment, effective August 1, 2016, amending Sentencing Guidelines § 4B1.2(a)(2) to delete the residual clause as a matter of policy in light of "many of the same concerns cited by the Supreme Court in *Johnson*"). *Johnson* did not address whether its holding applies to the Guidelines. In cases on direct review, the courts of appeals have disagreed on that issue. Compare *United States* v. *Madrid*, 805 F.3d 1204, 1210-1211 (10th Cir. 2015) (agreeing with the government that it does), with *United States* v. *Matchett*, 802 F.3d 1185, 1193-1196 (11th Cir. 2015) (disagreeing with the government), petition for reh'g en banc pending, No. 14-10396 (11th Cir. filed Oct. 13, 2015). But in Guidelines cases on collateral review, the government has argued that *Johnson* is not entitled to retroactive effect, because the Guidelines are part of the process for imposing sentence, rather than a set of substantive rules that alter the statutory boundaries of sentencing. See U.S. Br. at 8-12, *In re Rivero*, No. 15-13089 (11th Cir. Sept. 28, 2015). That issue has not yet been resolved by any court of appeals.

E. This Court Should Hold That *Johnson* Is A Substantive Rule In The Context Of Determining Whether A COA Should Issue

This case comes to the Court on the court of appeals' denial of a COA. See J.A. 14a. Ordinarily, the only question at that stage is whether a prisoner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2). Such a showing is made when a claim is reasonably debatable. This Court can, however, conclude that the COA standard is satisfied because *Johnson* is in fact a substantive rule that applies retroactively on collateral review. It should do so here.

1. This case is an unusual posture because petitioner did not raise any vagueness challenge to the residual clause in his Section 2255 motion, nor did the court of appeals expressly address that issue in its pre-*Johnson* denial of a COA. At the time, that denial was correct. But petitioner did articulate his reliance on the claim at issue in *Johnson* in his pro se motion seeking a COA. J.A. 20a. And, although the court of appeals did not have the benefit of *Johnson*, this Court's decision constitutes intervening authority that it is appropriate to consider in determining whether a COA should issue. Cf. *Joseph* v. *United States*, 135 S. Ct. 705, 706 (2014) (statement of Kagan, J., joined by Ginsburg and Breyer, JJ., respecting the denial of certiorari) (noting routine practice of circuits on direct appeal to "accept[] supplemental or substitute briefs * * * when this Court issues a decision that upsets precedent relevant to a pending case and thereby provides an appellant with a new theory or claim").

Petitioner has met the COA standard because, at a bare minimum, in light of *Johnson*, he has made a

"substantial showing" that his sentence reflects "the denial of a constitutional right." 28 U.S.C. 2253(c)(2); *Slack* v. *McDaniel*, 529 U.S. 473, 483-484 (2000). And while the Court need only decide that "reasonable jurists could debate" whether *Johnson* is substantive such that a COA should be granted on that issue, *Miller El* v. *Cockrell*, 537 U.S. 322, 336 (2003), the Court could conclude that all reasonable jurists would agree that *Johnson* is substantive, which would authoritatively resolve the issue of *Johnson*'s retroactivity. *Slack*, 529 U.S. at 484 (prisoner's burden is to show that "reasonable jurists could debate (*or, for that matter, agree that*) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further") (emphasis added) (citation and internal quotation marks omitted).

Alternatively, the Court could simply hold that *Johnson* is a substantive rule in ACCA cases, thus settling the retroactivity issue for the lower courts. On occasion in analogous circumstances, the Court has announced the correct rule when determining whether a COA should have been issued, rather than holding only that the issue is reasonably debatable or explicitly stating that all reasonable jurists would agree about the proper resolution. See *Trevino* v. *Thaler*, 133 S. Ct. 1911, 1921 (2013) (holding that procedural default did not bar state prisoner's ineffective-assistance-of-counsel claim, where the court of appeals had affirmed the denial of a COA on that issue because of that court's view that "reasonable jurists cannot disagree with the district court's procedural ruling" on default, see *Trevino* v. *Thaler*, 449 Fed. Appx. 415, 426 (5th Cir. 2011)); *Jimenez* v. *Quarterman*, 555 U.S. 113, 121

(2009) (holding that a state prisoner's conviction was not yet final for purposes of federal statute of limitations, where court of appeals had denied a COA based on a contrary reading of the statute). No procedural impediment would prevent the Court from taking the same course here.

2. The Court's resolution of *Johnson*'s retroactivity is appropriate because it would resolve a wider conflict in the courts of appeals. Petitioner's case involves an initial collateral attack under Section 2255(a). The conflict in the courts of appeals on the question whether *Johnson* is retroactive. however, developed in the context of denials of authorization for leave to file second or successive Section 2255 motions, which raise the question whether this Court has "made" *Johnson* retroactive. A decision holding that *Johnson* is retroactive would answer that question.

a. Federal prisoners who completed their initial round of collateral review before *Johnson* may not file a "second or successive" Section 2255 motion seeking to invoke that decision unless they obtain pre-filing authorization from the court of appeals certifying that their claims rely on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. 2255(h)(2); see also 28 U.S.C. 2244(b)(3)(C). As the government has explained, the courts of appeals that have considered gatekeeping motions under 28 U.S.C. 2255(h) are divided on the question whether this Court "made" *Johnson* retroactive to cases on collateral review and on the methodology for answering that question. See U.S. Br. at 13-15, *In re Williams*, No. 15-758 (filed Dec. 22, 2015); see also Pet. 8. That conflict, however, is not directly reviewable by

this Court because Congress has barred certiorari review of denials of authorization to file successive collateral attacks. See 28 U.S.C. 2244(b)(3)(E), 2255(h); see generally *Felker* v. *Turpin*, 518 U.S. 651 (1996) (upholding Section 2244(b)(3)(E) against constitutional challenges).

b. Petitioner's case does not provide an occasion for resolving the disagreement in the lower courts on the methodology for deciding when this Court has "made" a decision retroactive. See generally *Tyler* v. *Cain*, 533 U.S. 656 (2001). That issue is unique to second or successive Section 2255 motions. But a ruling in petitioner's favor could "ma[k]e" *Johnson* retroactive and permit prisoners who had previously litigated a Section 2255 motion to satisfy the gatekeeping requirements of 28 U.S.C. 2255(h)(2). A ruling that *Johnson* is retroactive in ACCA cases would establish that this Court has made it so and clear the way for authorization of second or successive motions. Because multiple cases are in that posture and because statute-of-limitations considerations may preclude relief in such cases absent a definitive retroactivity ruling from this Court this Term, the Court should resolve the disagreement over whether *Johnson* is retroactive by holding that it is.[10]

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[10] Prisoners seeking to file second or successive motions must comply with a one-year statute of limitations in 28 U.S.C. 2255(f)(3). That period runs from the date *Johnson* was decided, not from the date of a decision holding it retroactive. See *Dodd* v. *United States*, 545 U.S. 353, 357 (2005). Defendants would therefore need to receive gatekeeping authorization in order to file Section 2255 motions by June 26, 2016 (one year after the decision in *Johnson*), absent application of equitable-tolling doctrine or the government's waiver of the limitations period. See 28 U.S.C. 2244(b)(3)(D) (court of appeals "shall grant or deny authorization

II. THE COURT OF APPEALS SHOULD DECIDE IN THE FIRST INSTANCE WHETHER PETITIONER'S CONVICTION FOR ROBBERY IS A VIOLENT FELONY UNDER THE ELEMENTS CLAUSE

In addition to the question of *Johnson*'s retroactivity, the Court also granted certiorari on the question whether the district court erred when it denied petitioner's Section 2255 motion, which had alleged that one of petitioner's Florida robbery convictions (see PSR ¶ 27) that was relied upon to impose an ACCA sentence was not a violent felony. See Pet. i. On petitioner's direct appeal, the court of appeals did not decide whether the Florida robbery statute required the use of violent force sufficient to satisfy the ACCA's elements clause at the time petitioner was convicted of robbery in 1996. 683 F.3d 1304, 1311-1312. The court assumed that it did not and concluded that petitioner's robbery conviction nevertheless qualified as an ACCA predicate under the residual clause. *Id.* at 1313-1314. On remand, the court of appeals should consider, in the first instance, whether the elements clause is satisfied.

A. In his pro se petition for a writ of certiorari, petitioner contends (Pet. 5) that he was convicted of "[r]obbery by sudden snatching" in violation of Fla. Stat. Ann. § 813.131 (West 2006), which prohibits "the taking of money or other property from the victim's person, with intent to permanently or temporarily deprive the victim or the owner of the money or other property, when, in the course of the taking, the victim was or became aware of the taking." Under the

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to file a second or successive application not later than 30 days after the filing of the motion").

"[r]obbery by sudden snatching" statute, "it is not necessary to show that * * * [t]he offender used any amount of force beyond that effort necessary to obtain possession of the money or other property" or that "[t]here was any resistance offered by the victim to the offender or that there was injury to the victim's person." *Id.* § 813.131(1)(a) and (b).

Petitioner, however, was not convicted under the "sudden snatching" statute he cites—that statute was not even enacted until 1999. See 683 F.3d at 1311. Rather, petitioner was convicted in 1996 under the Florida robbery statute, Fla. Stat. Ann. § 813.13(1) (West 2006), which criminalizes "the taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear." See J.A. 187a; PSR ¶ 27.

B. Under the ACCA's elements clause, a prior conviction punishable by a term exceeding one year of imprisonment is a violent felony if the crime "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. 924(e)(2)(B)(i)). The force required by the elements clause is "force capable of causing physical pain or injury to another person." See *Curtis Johnson* v. *United States*, 559 U.S. 133, 140 (2010). In *Robinson* v. *State*, 692 So. 2d 883 (1997), the Florida Supreme Court explained (a few months after petitioner's robbery conviction) that "in order for the snatching of property from another to amount to robbery" under Florida's robbery statute, "the perpetra-

tor must employ more than the force necessary to remove the property from the person"—there must be "resistance by the victim that is overcome by the physical force of the offender." *Id.* at 886. Furthermore, the fear contemplated by the Florida robbery statute is "the fear of death or great bodily harm." *United States* v. *Lockley*, 632 F.3d 1238, 1242 (11th Cir.) (quoting *Magnotti* v. *State*, 842 So. 2d 963, 965 (Fla. Dist. Ct. App.), review denied, 857 So. 2d 196 (Fla. 2003) (Tbl.)), cert. denied, 132 S. Ct. 257 (2011).

In *Robinson*, the Florida Supreme Court noted that, in the decision below, *Robinson* v. *State*, 680 So. 2d 481 (Fla. Dist. Ct. App. 1996), the First District Court of Appeals had relied on a decision in *Andre* v. *State*, 431 So. 2d 1042 (Fla. Dist. Ct. App. 1983), to support the proposition that robbery requires no more force than is necessary to remove property from a person who does not resist. 692 So. 2d at 886. In *Andre*, the Fifth District Court of Appeals had relied upon the Florida Supreme Court's statement in *McCloud* v. *State*, 335 So. 2d 257 (1976), that "any degree of force suffices to convert larceny into robbery." *Id.* at 258-259; see *Robinson*, 692 So. 2d at 886.

In overturning the lower court's decision, the Florida Supreme Court explained that the First and Fifth District Courts of Appeal had misconstrued *McCloud*, which must be understood within the factual context of that case. *Robinson*, 692 So. 2d at 886. *McCloud* involved a defendant who "gained possession of his victim's purse by exerting physical force to extract it from her grasp," and "the victim released the strap only after she fell to the ground." See *ibid.* The Florida Supreme Court explained that *McCloud* supports the proposition that robbery requires more force than

is necessary to remove property from another person. *Ibid.* (stating that the Court's holding was "[i]n accord with our decision in *McCloud*"). The court cited several cases and other sources demonstrating that Florida law contains a longstanding requirement that robbery must involve "resistance by the victim that is overcome by the physical force of the offender," notwithstanding a few intermediate court of appeals opinions suggesting that additional force was not required. *Ibid.*[11]

C. Now that the residual clause has been invalidated, the court of appeals will need to decide the question left open in petitioner's direct appeal—whether Florida robbery is a violent felony under the ACCA's elements clause. 683 F.3d at 1311-1314. Cf. *Lockley*, 632 F.3d at 1245 (holding that Florida robbery is a crime of violence under the elements clause of the career-offender sentencing guideline). Because the court of appeals upheld petitioner's conviction under the residual clause, and because the courts below have not yet analyzed in petitioner's case whether the Florida robbery statute is a violent felony under the elements clause (and was at the time of petitioner's robbery conviction in 1996), that issue should be addressed in the first instance by the court of appeals.

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[11] None of those cases arose in the Fourth District Court of Appeals, where petitioner was convicted. See *Welch*, 683 F.3d at 1311 & n.32.

CONCLUSION

The judgment of the court of appeals should be vacated and the case should be remanded.

Respectfully submitted.

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APPENDIX

1. 18 U.S.C. 922 provides in pertinent part:

Unlawful acts

* * * * *

(g) It shall be unlawful for any person—

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

(5) who, being an alien—

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26));

(6) who has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) who is subject to a court order that—

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition

which has been shipped or transported in interstate or foreign commerce.

* * * * *

2. 18 U.S.C. 924 provides in pertinent part:

Penalties

* * * * *

(a)(2) Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (*o*) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

* * * * *

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

(A) the term "serious drug offense" means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

* * * * *